

1 MAUREEN E. McCLAIN (State Bar No. 062050)

Email: mcclain@kmm.com

2 ALEX HERNAEZ (State Bar No. 201441)

Email: hernaez@kmm.com

3 MATTHEW P. VANDALL (State Bar No. 196962)

Email: vandall@kmm.com

4 KAUFF McCLAIN & McGUIRE LLP

One Post Street, Suite 2600

5 San Francisco, California 94104

Telephone: (415) 421-3111

6 Facsimile: (415) 421-0938

7 Attorneys for Defendants

ALTA BATES SUMMIT MEDICAL CENTER,

8 RUSSELL D. STANTEN, M.D., LEIGH I.G.

IVERSON, M.D., STEVEN A. STANTEN, M.D., and

9 WILLIAM M. ISENBERG, M.D., Ph.D.

10 G. SCOTT EMBLIDGE (State Bar No. 121613)

emblidge@meqlaw.com

11 RACHEL J. SATER (State Bar No. 147976)

sater@meqlaw.com

12 ANDREW E. SWEET (State Bar No. 160870)

sweet@meqlaw.com

13 MOSCONE, EMBLIDGE & QUADRA LLP

220 Montgomery Street, Suite 2100

14 San Francisco, California 94104-4238

Telephone: (415) 362-3599

15 Facsimile: (415) 362-7332

16 Attorneys for Plaintiff

17 COYNESS L. ENNIX, JR., M.D.

18 UNITED STATES DISTRICT COURT

19 NORTHERN DISTRICT OF CALIFORNIA

20 COYNESS L. ENNIX, JR., M.D., as an
21 individual and in his representative capacity
22 under Business & Professions Code Section
17200 et seq.,

23 Plaintiff,

24 v.

25 RUSSELL D. STANTEN, M.D., LEIGH I.G.
26 IVERSON, M.D., STEVEN A. STANTEN,
27 M.D., WILLIAM M. ISENBERG, M.D.,
Ph.D., ALTA BATES SUMMIT MEDICAL
CENTER and does 1 through 100,

28 Defendants.

CASE NO. C 07-2486 WHA

**JOINT CASE MANAGEMENT
STATEMENT AND [PROPOSED]
ORDER**

DATE: August 16, 2007

TIME: 8:00 a.m.

DEPT: Ctrm. 9, 19th Flr.

JUDGE: Hon. William H. Alsup

COMPLAINT FILED: May 9, 2007

TRIAL DATE: No date set

1 Plaintiff and Defendants, through their respective counsel, submit the
2 following Joint Case Management Statement.

3 1. Jurisdiction and Service.

4 As Plaintiff pleads a claim under 42 U.S.C. § 1981, the Court has subject
5 matter jurisdiction under 28 U.S.C. § 1331. In their pending Motion to Dismiss,
6 Defendants have asked the Court, inter alia and depending upon the outcome of the
7 motion, to decline to exercise supplemental jurisdiction over Plaintiff's state claims under
8 28 U.S.C. § 1367 (c) (2) or § 1367 (c) (3). Plaintiff has opposed such request. All
9 named Defendants have been served. There are no issues regarding personal
10 jurisdiction or venue.

11 2. Facts.

12 Plaintiff, a cardiothoracic surgeon who is African-American, is a member of
13 the medical staff of Defendant Alta Bates Summit Medical Center ("Medical Center"). He
14 has sued the Medical Center and four current or former members of the Medical Staff of
15 the Summit campus of the Medical Center. (The Alta Bates campus has a separate
16 medical staff.) The four individual defendants (and their Medical Staff positions during
17 periods alleged in the Complaint) are: William Isenberg, M.D., Medical Staff President
18 from 2/2004 through 2/2006; Russell Stanten, M.D., Chief of the Cardiothoracic Surgery
19 Service; Steven Stanten, M.D., Chair of the Department of Surgery; and Leigh Iverson,
20 M.D., a cardiothoracic surgeon (now retired) who served on the Surgery Department
21 Peer Review Committee and Medical Executive Committee during certain relevant time
22 periods.

23 Plaintiff contends, in five different legal theories, that a peer review process
24 undertaken by the Summit Medical Staff from about early 2004 through mid-2006 was a
25 "sham" process under which he was treated in a disparate manner because of his race.
26 Plaintiff also contends that the individual defendants conspired to harm him in order to
27 gain a competitive advantage for defendants Russell Stanten and Leigh Iverson in the
28 field of cardiac surgery. Defendants deny Plaintiff's allegations, and contend that the

1 peer review process was both warranted by issues concerning Plaintiff's care of patients,
2 and undertaken in accordance with Medical Staff responsibilities established by federal
3 and state law. A summary of factual issues in dispute is:

4 a. Whether various indicators concerning Plaintiff's surgeries
5 combined with other issues concerning Plaintiff's provision of patient care reasonably led
6 to the peer review process here undertaken. Plaintiff contends that the scope and
7 nature of the peer review was not warranted and unprecedented; Defendants contend
8 that they were required under both the Medical Staff Bylaws and governing law to
9 engage in such peer review.

10 b. Whether Plaintiff was discriminated against on the basis of
11 his race. Plaintiff contends that discovery will establish that he was subject to disparate
12 treatment when the peer review process applied to him and the discipline imposed on
13 him are compared with peer review processes and discipline involving non-African-
14 American physicians. Defendants dispute both Plaintiff's contention and his intended
15 methodology of proof. Because of the wide variation among medical procedures and the
16 fact specific nature of peer review, even within the same medical specialty, Defendants
17 contend that it will be impossible to establish similar circumstances to support an
18 argument of differential treatment as a predicate for an intentional discrimination claim.
19 Plaintiff contends that he is entitled to conduct discovery regarding other peer review
20 processes and to prove his case by comparing his treatment with that of similarly-
21 situated White physicians.

22 c. Whether Plaintiff failed to exhaust applicable hearing
23 procedures set forth in the Medical Staff Bylaws or governing law, and if so, whether
24 such failure to exhaust precludes his challenging the peer review process placed at
25 issue in his Complaint. Plaintiff argues that he is not so precluded; Defendants argue
26 the opposite.

27 d. Whether the immunity provisions of state and federal law
28 governing peer review apply as a matter of fact to the peer review process placed at

1 issue in this Complaint, and if so, whether those provisions preclude all or some of
2 Plaintiff's claims. Plaintiff contends that the immunity protections do not apply;
3 Defendants contend that they apply on the face of the Complaint to Plaintiff's state law
4 claims.

5 e. Whether Plaintiff can establish the elements of a Cartwright
6 Act violation, including a definable market and an anti-competitive effect, and if so,
7 whether Plaintiff can establish that the individual defendants conspired to restrain trade
8 in the manner Plaintiff alleges.

9 f. Whether the lawsuit has resulted (and will continue to result)
10 in the chilling of the peer review process such that the provisions of California Code of
11 Civil Procedure § 425.16 (the SLAPP statute; "C.C.P. § 425.16") require the striking of
12 Plaintiff's state law claims (Defendants' Special Motion to Strike is currently pending
13 before the Court). Plaintiff does not agree that any alleged "chilling effect" is relevant to
14 whether the SLAPP statute requires the striking of any of Plaintiff's claims.

15 g. Whether Plaintiff can establish the elements of a common law
16 claim of interference with his right to practice a profession against any Defendant.

17 h. Whether Defendant Leigh Iverson, M.D. refrained from
18 participation in the peer review process such that he is not a proper defendant in this
19 action. Plaintiff contends that Dr. Iverson is a proper defendant if he conspired to harm
20 Plaintiff and injure competition, regardless of the extent to which Dr. Iverson formally
21 participated in the peer review process.

22 i. Whether Plaintiff has incurred any damage and if so the
23 nature and extent of any such claimed damage.

24 j. Whether Plaintiff can establish the elements of a claim for
25 unfair business practices under California Business & Professions Code Section 17200.

26 3. Legal Issues.

27 a. What is the required contractual showing for proving a claim
28 under 42 U.S.C. § 1981 given the holding of *Domino's Pizza, Inc. v. McDonald*. 546 U.S.

1 470, 480 (2006). Plaintiff contends the holding of *Domino's* is not applicable to this case
2 given what Plaintiff asserts to be clear contractual relationships between Plaintiff and the
3 hospital and its Medical Executive Committee. Defendants contend that Plaintiff cannot
4 establish a direct contractual relationship with Defendant ABSMC so as to meet the legal
5 requirements of *Domino's*.

6 b. What are the elements of a Section 1981 claim, and how do
7 they apply to the particularized facts of this case. See, *Lindsey v. SLT Los Angeles,*
8 *LLC*, 447 F. 3d 1138, 1144-1145 (9th Cir. 2006) which applies the *McDonnell Douglas*
9 elements of proof to a Section 1981 claim.

10 c. What is the effect, if any, of C.C.P. § 425.16 upon the
11 maintainability of Plaintiff's state law claims which are: the Second Cause (violation of
12 the Unruh Act, California Civil Code § 51 et seq. pled against the Medical Center); the
13 Third Cause (violation of the Cartwright Act, Cal. Bus. & Prof. Code §§ 16700 et seq.
14 pled against the individual Defendants); the Fourth Cause (a common law claim of
15 interference with right to practice a profession pled against all Defendants); and the Fifth
16 Cause (a claim under the California Unfair Competition Law, Cal. Bus. & Prof. Code §§
17 17200 et seq. pled against all Defendants).

18 d. What is the effect, if any, of the exhaustion requirements in
19 the Medical Staff's Bylaws upon Plaintiff's claims. Cal. C.C.P. § 1085. See also,
20 *Westlake Comm. Hosp. v. Los Angeles Superior Ct. (Kaiman)*, 17 Cal. 3d 465, 483-484
21 (1976).

22 e. What is the applicability, if any, of the immunity provisions of
23 the Health Care Quality Improvement Act, 42 U.S.C. §§ 11101 et seq. to Plaintiff's state
24 law claims.

25 f. What is the applicability, if any, of various state law immunity
26 protections (Cal. Civil Code §§ 43.7, 43.8 and 47) to Plaintiff's state law claims.

27 g. What are the elements of a Cartwright Act claim, and how do
28 they apply to this case.

1 h. What are the elements of a common law claim of interference
2 with a right to practice a profession and how do they apply to this case.

3 i. What are the requirements of a Cal. Bus. & Prof. Code §
4 17200 claim and how do they apply to the facts of this case. What types of relief are
5 available under a § 17200 claim. Plaintiff seeks, inter alia, lost profits under this claim;
6 Defendants contend that alleged lost profits are not recoverable under § 17200 because
7 such element of claimed loss is not properly characterized as restitution.

8 j. What are the legal requirements for Plaintiff to establish
9 damage entitlement under any of his claims, and what laws apply to the awarding of
10 attorneys' fees and costs to either side in this action.

11 k. Whether Plaintiff is entitled to discovery regarding the peer
12 review processes applied to, and discipline imposed on, other physicians in order to
13 prove Plaintiff's disparate treatment claims.

14 4. Motions.

15 Defendants' Special Motion to Strike under Cal. C.C.P. 425.16 and
16 Defendants' Fed. R. Civ. P. 12 (b) (6) motions are set for hearing on August 16, 2007.

17 As to any subsequent motions, Defendants anticipate further motions to
18 dismiss and/or for summary judgment should their pending motions not resolve the case.
19 Plaintiff may have motions addressing affirmative defenses or other issues; however, it is
20 premature to delineate such motions given that the case is in a preliminary pleading
21 stage.

22 5. Amendment of Pleadings.

23 There may be amendments by Plaintiff arising out of the pending Motion to
24 Dismiss the Complaint, depending upon the Court's ruling.

25 6. Evidence Preservation.

26 Both sides have taken steps to preserve evidence. Plaintiff's counsel have
27 notified their client to preserve all documentary evidence relating to the Lawsuit.
28 Defendants' counsel have notified, both verbally and in writing, Medical Center

1 administrators, Medical Staff leadership, custodians of peer review records, and
2 members of involved peer review committees to preserve all documentary evidence
3 relating to this case.

4 7. Disclosures.

5 Both sides anticipate providing initial disclosures by August 9, 2007.

6 8. Discovery.

7 By agreement of the parties, Defendants have deposed Plaintiff whose
8 deposition was initially noticed and scheduled when the case was in state court. Plaintiff
9 has responded to an initial document production request in conjunction with the agreed-
10 upon deposition. The parties have also exchanged substantial documentation in their
11 filings regarding Defendants' Special Motion to Strike. Plaintiff intends to serve written
12 discovery as an initial discovery step to be followed by witness depositions. Defendants
13 intend to serve written discovery (including third party subpoenas) and to take
14 depositions of witnesses identified by Plaintiff as well as of third party witnesses. The
15 Parties have also agreed to consider the informal exchange of information which Plaintiff
16 has identified as central to his analysis of the case. Both Parties expect the identification
17 of experts and ensuing expert discovery.

18 The Parties anticipate substantial disputes over the scope of discovery.
19 Plaintiff has indicated an intent to explore other peer review actions on the part of the
20 Medical Staffs; Defendants have responded that such intended discovery raises
21 significant confidentiality and privacy issues (on the part of both physicians and patients).
22 Plaintiff asserts that both patient and physician privacy interests are adequately
23 protected by the Stipulated Protective Order. Defendants have also questioned the
24 propriety of any such discovery given the need to establish similar circumstances as a
25 prerequisite for obtaining any probative evidence concerning the race discrimination
26 allegations, and the fact that peer review processes are, in Defendants' view, inherently
27 dissimilar. Plaintiff asserts that no determination can be made regarding the probative
28 value of other physicians' peer review records without reviewing such records, and

1 further that Defendants' concerns regarding their probative nature does not form a basis
2 to deny discovery of those materials. The Parties expect that such disputes will be
3 raised in Defendants' responses to Plaintiff's initial propounding of written discovery.

4 The Parties have entered into a Confidentiality Stipulation, as approved by
5 the Court in accordance with certain conditions, and have submitted portions of their
6 respective filings relative to the Special Motion to Strike under seal in accordance Civil
7 Local Rule 79-5.

8 As to limitations imposed by the Federal Rules of Civil Procedure, the
9 Parties agree with a 7-hour limitation on deposition duration, but disagree regarding the
10 limitations on depositions and interrogatories set by Fed. R. Civ. P. Rule 30 (2) (A) and
11 Rule 33 (a). Defendants believe the Rules limitations should be followed; Plaintiff
12 believes that he requires up to 20 non-expert depositions and up to 50 written
13 interrogatories.

14 9. Class Actions.

15 This case is not a class action.

16 10. Related Cases.

17 The Parties know of no related cases.

18 11. Relief.

19 a. Plaintiff seeks the following relief:

20 Plaintiff seeks compensatory, and other special and general damages,
21 restitution, disgorgement and punitive damages according to proof as well as interest,
22 costs of suit, attorneys' fees and injunctive relief.

23 b. Defendants seek the following relief:

24 Defendants seek dismissal of the case on, inter alia, the grounds set forth
25 in their Motion to Dismiss and Special Motion to Strike, and seek their attorneys' fees
26 and costs, including those sought in their Special Motion to Strike.

12. Settlement and ADR.

There have been no settlement discussions or processes to date. At present, particularly given the pending motions, it is premature to discuss settlement. The Parties also believe that some discovery will be required before either side can realistically assess the prospects for settlement. The Parties have timely filed a stipulated request for the scheduling of an ENE session.

13. Consent to Magistrate Judge for All Purposes.

Defendants have filed a declination to proceed before a U.S. Magistrate.

14. Other References.

The Parties have no other references to propose at this time.

15. Narrowing of Issues.

The Parties are committed to exploring the narrowing of issues, and presenting as much of the case as possible on a set of stipulated facts. For example, the Parties believe that the steps taken in the peer review process are largely undisputed and hence can be presented by stipulated fact or an agreed-upon summary. Either Party may have proposals for bifurcation depending upon what issues remain in the case following hearing upon the pending motions.

16. Expedited Schedule.

As exemplified by Defendants' prompt filing of a Special Motion to Strike and their opposition to any continuance in hearing on such Motion (an opposition rejected by the Court), Defendants believe that this matter should be expedited given the fact that Plaintiff remains a member of the Medical Staff and hence subject to continuing peer review, and given Defendant's view (as presented in its Special Motion to Strike) that the pendency of this case has a chilling effect on the peer review process. Plaintiff does not agree with the need for expedition, in light of Plaintiff's view that he is under no greater peer review than any other physician at this time, and further believes that an expedited schedule will hinder his ability to conduct adequate discovery necessary to prove his case.

17. Scheduling.

Plaintiff proposes June 2008 for trial. As noted above, Defendants propose an expedited trial schedule. Depending upon the trial date, the Parties propose a dispositive motion cut-off of 90 days before trial; a non-expert discovery cut-off of 60 days before trial; an expert discovery cut-off of 45 days before trial; and a pretrial conference date approximately 30 days before trial.

18. Trial.

Plaintiff has demanded a jury. The Parties anticipate up to 10 court days for trial.

19. Disclosure of Non-party Interested Entities or Persons.

Plaintiff filed his Certificate of Interested Parties concurrently with the Complaint, which identified no interested parties.

Defendants filed their Certification of Interested Parties on 5/22/07. The Parties so identified are: Sutter Health, the Summit Medical Staff and the Alta Bates Medical Staff.

///

///

///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

20. Other Matters Facilitating the Just, Speedy and Inexpensive

Disposition of this Matter.

The Parties know of no other matters at present.

DATED: August 8, 2007

KAUFF McCLAIN & McGUIRE LLP

By: /S/
MAUREEN E. McCLAIN

Attorneys for Defendants
ALTA BATES SUMMIT MEDICAL
CENTER, RUSSELL D. STANTEN, M.D.,
LEIGH I.G. IVERSON, M.D., STEVEN A.
STANTEN, M.D., and WILLIAM M.
ISENBERG, M.D., Ph.D.

DATED: August 8, 2007

MOSCONE, EMBLIDGE & QUADRA LLP

By: /S/
G. SCOTT EMBLIDGE

Attorneys for Plaintiff
COYNESS L. ENNIX, JR., M.D.¹

¹ Maureen McClain, the e-filer of this document, hereby attests that she has the concurrence of Plaintiff's counsel, G. Scott Emblidge and Rachel Sater, to file this document as a joint statement from both counsel.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CASE MANAGEMENT ORDER

The Case Management Statement and Proposed Order is hereby adopted by the Court as the Case Management Order for the case and the Parties are ordered to comply with this Order.

SO ORDERED.

DATED: _____

Hon. William H. Alsup
UNITED STATES DISTRICT JUDGE

120555.v1